Supreme Court, U.S.
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In The

Supreme Court of the United States

No. 79-1578

ALLEN RANCE CALDWELL and
VICTOR ALAN GREGG,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, ALLEN RANCE CALDWELL and VICTOR ALAN GREGG, respectfully pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the circuit court of appeals (attached hereto as Appendix A) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 22, 1980. A petition for rehearing en banc was denied on March 10, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the warrantless seizure and inspection of a box found in Petitioner Caldwell's automobile was a violation of the Fourth Amendment to the Constitution?

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The evidence at the trial was stipulated by agreement of the parties.

Officer Raymond Martin of the Los Angeles Police Department monitored conversations between Petitioner Caldwell and another concerning the sale of cocaine. Officer Martin then received a telephone call from Caldwell, who said he had a pound of cocaine for sale. On October 3, 1978, Officer Martin met with Caldwell in the parking lot of the Dallas/Fort Worth Regional Airport. While in Caldwell's MG automobile, Caldwell allowed Officer Martin to examine and test an ounce of cocaine. Officer Martin then permitted Caldwell to examine $40,000.00, of which $36,800.00 was the agreed price for the pound of cocaine. Caldwell left the airport and went

to a Dairy Queen parking lot, where he met with Petitioner Gregg. Gregg delivered an object to Caldwell. Both petitioners returned to the airport in separate automobiles. Caldwell returned to the airport terminal, met with Officer Martin and advised him that the rest of the cocaine was in his, Caldwell's, automobile. Martin and Caldwell went to the automobile where Martin observed the cocaine in a small box. Appellant Gregg stayed in his automobile, which was parked in a position to observe the transaction. Martin and Caldwell returned to the terminal where Caldwell was arrested. The officers returned to Caldwell's automobile, seized and opened the box. Fifteen ounces of cocaine were recovered from the box, which resembled the object that Gregg had given to Caldwell. Gregg was then arrested. A search of his person resulted in the seizure of a clear metallic inhaler which contained a residue of cocaine in a white powder form. Gregg's automobile was seized and removed to the Dallas/Fort Worth Regional Airport Department of Public Safety parking lot where it was searched.

The trial court denied petitioners' Motion to Suppress the cocaine found in the box and a metallic inhaler containing a residue of cocaine found on Gregg, and found both petitioners guilty of committing the offense of conspiracy to possess with intent to distribute and conspiracy to distribute cocaine (21 U.S.C. §3841[a] [1] and §846), and the substantive offense of possessing with intent to distribute approximately one pound of cocaine. (21 U.S.C. §841[a] [1]). The trial court specifically held that the warrantless search of the box was based upon exigent circumstances.[1]

[1] "Probable cause was undeniably present. The agent had actually seen the two bags of cocaine in Caldwell's car. Additionally. *Gaultney, supra,* recognized that the danger to the public of leaving a pound of cocaine in a car while obtaining a warrant created an exigent circumstance which justifies a warrantless search."

Petitioners contend that a warrant should have been required to search the box found in Caldwell's car. Petitioners' contention is based on this Court's decision in *Arkansas v. Sanders*, ___ U.S. ___, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), where Mr. Justice Powell wrote:

> "We conclude that the State has failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles. A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But, as we noted in *Chadwick*, the exigency of mobility must be based at the point immediately before the search — after the police have seized the object to be searched and have it securely within their control."

The opinion then held that there was an expectation of privacy in the suitcase and concluded there was no justification for the extension of *Carroll v. United States*, 267 U.S. 132 (1925) to the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped.

The primary issue then is whether Caldwell had a legitimate expectation of privacy which would prevent the inspection of the box once it was seized.[2] The test for an expectation of privacy was stated in *Smith v. Maryland*, 442 U.S. ___, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) as:

1. whether there has been a subjective expectation exhibited, and
2. whether the expectation is one that society will recognize as reasonable.

Petitioners would contend that the apparent placing of the contraband in a closed box is a clear exhibition of a subjective

[2] Petitioners concede that there was probably cause to search the automobile and to seize the box. Appellants would also concede that if Officer Martin had arrested Petitioner Caldwell while both were in the automobile inspecting the cocaine, no warrant would have been required.

expectation of privacy. Further, society recognizes that the very purpose of a closed box is to serve as a repository for personal items. See *United States v. Dien*, 609 F.2d 1038 (2nd Cir. 1979), which held that cardboard boxes found in a van fell within the expectation of privacy standard. See also, *United States v. Bloomfield*, 594 F.2d 1200 (8th Cir. 1979), applying the expectation to a tightly sealed knapsack.

The fact that Cladwell exhibited the contents of the box to Agent Martin several minutes before the arrest should not remove the expectation of privacy. Caldwell knowingly exposed the contents of the box to the undercover officer. However, before a seizure occurred, the contents were placed inside a closed box which was left in an automobile of which Caldwell had sole possession. Petitioners contend that once the undercover officer left the automobile, the expectation of privacy was re-established. See *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977), where the government had argued that a reasonable expectation of privacy can only be lost once. The circuit court held that argument to be erroneous, relying on this Court's discussion of the concept of consent in the Fourth Amendment context in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The factual circumstances in *Mason v. Pulliam, supra*, (demand for return from the Internal Revenue Service of taxpayer's record) are totally different than in the present case, but the proposition that the expectation of privacy may be lost and regained is applicable to both cases. Stated differently, if a person invites guests into his home, for whatever reason, he does not permanently lose his expectation of privacy. Here, Caldwell and the undercover agent were not in the automobile when Caldwell was arrested. The expectation of privacy should be based at the point immediately before the search.

The decision of the circuit court below decided a federal question in a way in conflict with this Court's opinions in *Arkansas v. Sanders, supra,* and *United States v. Chadwick,* 433 U.S. 1 (1977).

CONCLUSION

For the reasons set forth above, petitioners respectfully submit that writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this petition were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C., 20530, on this the 8th day of April, 1980.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5140

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

VICTOR ALAN GREGG and
ALLEN RANCE CALDWELL,
Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Texas

(JANUARY 22, 1980)

Before AINSWORTH, INGRAHAM and GARZA,
Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

ISSUED AS MANDATE: